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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970.

No. 322.

JOSEPH McKEIVER

and

EDWARD TERRY,

Appellants,

v.

PENNSYLVANIA,

Appellee.

Appeal from the Supreme Court of Pennsylvania.

Brief for Appellee

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Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

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JOSEPH McKEIVER

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Appellee.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR APPELLANTS

STATEMENT OF QUESTIONS PRESENTED.

I. Have the decisions of this Court so equated juvenile delinquency proceedings with criminal trials that the Sixth Amendment requirement of trial by jury *in all criminal prosecutions* prohibits the States from legislating a juvenile court procedure which does not provide for a jury as the finder of fact?

II. Apart from the applicability of criminal law standards to juvenile delinquency proceedings, is trial by jury so essential to fundamental fairness that the Fourteenth Amendment prohibition against deprivations of liberty *without due process of law* prohibits the States from legislating a juvenile court procedure which does not provide for juries as the finder of fact?

STATEMENT OF THE CASE.

This is an appeal from the order of the Supreme Court of Pennsylvania, *Terry Appeal*, 438 Pa. 339, 265 A. 2d 350 (1970), affirming two orders of the Superior Court of Pennsylvania which upheld the adjudications of delinquency which form the underlying basis of the present appeals. The procedural history of two cases is as follows:

A. JOSEPH McKEIVER.

This is an appeal from orders of the appellate courts of Pennsylvania affirming the order of the Honorable Theodore S. Gutowicz of the Court of Common Pleas, Family Division, Juvenile Branch, of Philadelphia County, adjudicating appellant delinquent on charges of robbery, larceny, and receiving stolen goods.

Joseph McKeiver's case came before the Juvenile Court n May 15, 1968, upon petition charging the minor with al-ged acts of delinquency including robbery, larceny, and eceiving stolen goods. The matter was continued to Oc-ber 17, 1968, because the child was without legal coun-el to represent him. At that time the case was referred to Community Legal Services.

On the date of the adjudicatory hearing, October 17, 968, counsel for appellant requested a jury trial. This equest was denied and the case heard by the Court.

Appellant was adjudicated a delinquent and placed on robation.

On November 7, 1968, counsel for appellant filed a peti-ion for rehearing, based only on the denial of the jury for trial. The hearing was held on December 20, 1968, and on February 13, 1969, the Court denied the petition stating "Petition for rehearing, based on the failure of the court to allow a jury trial, is denied."

After briefs and oral argument, the Superior Court af-firmed. *McKeiver Appeal*, 215 Pa. Superior Ct. 760, 255 A. 2d 921 (1969). The Supreme Court of Pennsylvania granted leave to appeal and, on December 30, 1969, con-solidated the case with the appeal of one Edward Terry which raised the same issue. Briefs were submitted, oral argument held, and on May 4, 1970, the orders of the Su-perior Court were affirmed. *Terry Appeal, supra.*

B. EDWARD TERRY.

This is an appeal from orders of the appellate courts of Pennsylvania affirming the order of the Honorable Jo-seph C. Bruno of the Court of Common Pleas, Family Di-vision, Juvenile Branch, of Philadelphia County, adjudi-cating appellant delinquent on charges of assault and battery and conspiracy.

This matter came before the Court on August 31, 1968, upon petition, charging the minor with alleged acts of de-

linquency including assault and battery on a police officer and conspiracy.

On March 27, 1969, the youngster, with counsel, appeared before the Court at which time a request was made for jury trial. The request was denied and the matter was heard by the Court sitting without jury. Edward Terry was adjudicated a delinquent and placed at the Youth Development Center at Cornwells Heights.

On May 6, 1969, appellant filed a petition for rehearing alleging the denial of a jury trial. Such petition was denied.

After briefs and oral argument, the Superior Court affirmed. *Terry Appeal*, 215 Pa. Superior Ct. 762, 255 A. 2d 922 (1969). As stated previously, the Supreme Court of Pennsylvania allowed an appeal, consolidated the case with the appeal of Joseph McKeiver, received briefs, heard argument, and affirmed.

This appeal followed.

SUMMARY OF ARGUMENT.

The whole basis of appellants' argument is that, since the right to trial by jury is applicable to the States in all criminal trials under the decisions of this Court, the same procedure must be guaranteed to youths in juvenile delinquency proceedings.

In so arguing, appellants have overlooked the basic holdings of this Court's decisions concerning both juvenile court procedures and the right to jury trial, and in so doing have misread the constitutional provisions which underlay this Court's decisions.

Thus, it is clear that this Court has as firmly refused to apply the label "criminal" to juvenile court proceedings as it has rejected the attempts of others to label them merely "civil." Rather, the Court has treated the field of juvenile court cases as sui generis.

On the other hand, this Court has carefully limited its decision in *Duncan v. Louisiana* to criminal cases, where trial by jury was inherent in the basic procedures of every jurisdiction, and has not said anything which would make the decision applicable to juvenile proceedings where bench trials are required in the vast majority of jurisdictions.

Moreover, it is clear that there is no fundamental unfairness in nonjury trials which makes the requirements of such trials in juvenile court proceedings a denial of due process of law. Not only did this Court recognize in *Duncan* itself that it would be perfectly possible to create a fair and equitable fact finding procedure without trial by jury, but the overwhelming majority of legislatures, courts and commentators have concluded that the juvenile courts are actually or potentially such a system.

Finally, if nonjury trials provide a fair fact finding system in juvenile courts, this Court should not force the States to abandon experimentation in the juvenile court field and force them to adopt throughout the criminal law model so long as the procedure adopted is equally effective in protecting the substantive rights of juveniles to a fair and accurate adjudication of all factual issues.

ARGUMENT.

I. NOTHING IN THE DECISIONS OF THIS COURT HAS SO EQUATED DELINQUENCY PROCEEDINGS WITH CRIMINAL TRIALS AS TO REQUIRE THE AUTOMATIC APPLICATION OF THE SIXTH AMENDMENT RIGHT TO JURY TRIALS TO JUVENILE COURTS.

With respect to state court criminal trials, this Court has in the past decade abandoned the more amorphous and flexible standards of "due process" to apply to the States

the specific requirements of the Bill of Rights through the Fourteenth Amendment. With the exception of grand jury indictment, public and local trial, and non-excessive bail, each of these guarantees has been directly applied to the conduct of state, as federal, criminal trials. Among those rights specifically held as applicable to state as to federal criminal prosecutions is the right to trial by jury. *Duncan v. Louisiana*, 391 U. S. 145 (1968).

A. Juvenile Proceedings Parallel, Rather than Mimic, Criminal Procedure.

At the same time that this Court has moved to apply the federal constitutional model to state criminal trials, it has decided a parallel series of cases bringing juvenile delinquency proceedings within the more general standards of due process of law. See *Kent v. United States*, 383 U. S. 542 (1966); *In re Gault*, 387 U. S. 1 (1967); *In re Winship*, 397 U. S. 358 (1970). Each of these cases has afforded juveniles greater protection against arbitrary action. Since *Kent*, no juvenile court can relinquish its jurisdiction without affording the juvenile a full hearing; since *Gault*, in the adjudication of delinquency the juvenile must have notice, the right to counsel, the privilege against compulsory self-incrimination, and the right to cross-examine witnesses; since *Winship*, finally, a determination of delinquency must be based on proof beyond a reasonable doubt.

In each of these cases, this Court has rejected the simplistic argument that due process standards do not apply to juvenile court proceedings because these proceedings are "civil" rather than "criminal." But, at the same time, the Court did not accept the equally simplistic device of merely equating juvenile court proceedings with criminal prosecutions. Thus, for example, when the Court decided *Gault*, the fifth amendment protection against compulsory self-incrimination, *Malloy v. Hogan*, 378 U. S. 1 (1964), and the sixth amendment right to confrontation and cross-exam-

ination of witnesses, *Pointer v. Texas*, 380 U. S. 400 (1965), and *Douglas v. Alabama*, 380 U. S. 415 (1965), had already been applied to state criminal trials. Yet the Court took fifteen pages to decide that these particular rights should also apply in juvenile proceedings. 387 U. S. at 42-57. Likewise, in *Winship* the Court first held that the reasonable doubt standard was a constitutional safeguard in criminal trials. This, however, did not resolve the issue; the Court then turned to the question "whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law." 397 U. S. at ——, 90 S. Ct. at 1073. Only after an extended discussion did the Court hold that it would be unfair to permit the incarceration of a juvenile on less proof than would be needed to imprison an adult.

These well reasoned and extended discussions by the Court reveal a reluctance to equate juvenile trials with criminal trials. Rather, the Court has preferred to examine each particular procedural right to determine its utility in juvenile proceedings. In fact, the Court has been quite explicit on this point:

> We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing. . . .

Kent v. United States, 383 U. S. at 562, reiterated in *Gault*, 387 U. S. at 30, and *Winship*, 397 U. S. at ——, 90 S. Ct. at 1070.

In refusing merely to equate juvenile proceedings with ordinary criminal trials, this Court has consistently recognized that, whatever the failing of the juvenile courts, there is still reason to preserve the peculiar virtues which the juvenile courts had in dealing with others who would, but for the juvenile court acts, find themselves on trial as adult criminals. Thus, most recently, this Court in *Winship* carefully qualified its decision (397 U. S. at ——, 90 S. Ct. at 1075) (emphasis added):

> Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process. Use of reasonable-doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. *Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place.* And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings which are employed prior to the adjudicatory hearing.

(Footnotes omitted.) In addition to trial by jury, the issue involved in this case, there are several other constitutional rights involved in the trial of adults which would appear to be inimical to juvenile court proceedings and, presumably, are not constitutionally required in such proceedings whether in state or federal courts. Thus, for example, no formal indictment by a grand jury is required in federal juvenile cases and clearly would be out of keeping with state juvenile proceedings even if this Court were to hold that this Fifth Amendment right is applicable to the states. Similarly, the Sixth Amendment right to a public trial, which may well be required in state criminal prosecutions, see *United States ex rel. Bennett v. Rundle*, 419 F. 2d 599 (3d Cir. 1969), would be totally out of keeping in juvenile proceedings where increased rather than decreased confidentiality and secrecy seems in order. See *In re Winship*, 397 U. S. at ——, 90 S. Ct. at 1074 and n. 5.

B. Duncan is a Purely Criminal Law Decision.

On the other hand, it is obvious that this Court was very specifically thinking of the criminal process in the traditional sense when it decided *Duncan v. Louisiana*, 391 U. S. 145 (1968). The holding in *Duncan* is stated most simply:

> It is sufficient for our purposes to hold that a *crime* punishable by two years in prison is . . . a serious crime . . . and appellant was entitled to a jury trial . . .

391 U. S. at 161-62 (emphasis added).

An analysis of the *Duncan* opinion makes it clear why it has not been held applicable to juvenile proceedings.

In *Duncan* at footnote 30, the Court stated:

> Louisiana also asserts that if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment, an amendment which in its inception was designed to control only the Federal Courts and which throughout its history has operated in this limited environment where uniformity is a more obvious and immediate consideration. *It seems unlikely to us that our decision today will require widespread changes in state criminal processes.*

(Emphasis added.) It must, thus, be evident that this Court in *Duncan* wished to limit its holding as narrowly as possible.

The Commonwealth does not quarrel with appellants' arguments spelling out the historical background of the right to trial by jury in *criminal cases*. However, *Gault* never intended that all of the procedures inherent in criminal cases were to be made applicable to juvenile cases. The basic thrust of *Gault* was to mandate "fairness" in juvenile proceedings.

Most states do not provide for jury trials in juvenile cases and to make such a requirement at this stage of the changing development of juvenile court law would create

a disruptive effect in the basic concept of the treatment of juveniles that would ultimately defeat the very purpose of distinguishing between juveniles and adults.

In this respect, the basic thrust of *Duncan* can best be understood when observing the following statement made at footnote 14 of that decision:

> A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. *Yet, no American State has undertaken to construct such a system.* Instead, every American State, including Louisiana, uses the jury extensively, and imposes *very serious punishments* only after a trial at which the defendant has a right to a jury's verdict. In every State, including Louisiana, the structure and style of the criminal process—*the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.* (Emphasis added.)

Thus, *Duncan* distinguishes between systems whose fabric is entwined with jury trial guarantees and those whose fabric is not. The American criminal trial system is an excellent example of the first category; the juvenile court system is equally an example of the second.

II. TRIAL OF JUVENILE CASES BEFORE EXPERIENCED JUDGES PROVIDES A FUNDAMENTALLY FAIR PROCEDURE IN KEEPING WITH THE FOURTEENTH AMENDMENT PROHIBITION AGAINST DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW.

As this Court's decisions in *Kent, Gault* and *Winship* make clear, a mere refusal to equate juvenile court proceedings with criminal prosecutions does not mean that

youths charged with juvenile delinquency are not guaranteed substantial constitutional protection. Rather, as each of this Court's decisions in the area has made clear, the due process clause of the Fourteenth Amendment requires that juvenile court procedures must grant a youth a trial which, if it does not follow all of the forms of the criminal process, nevertheless is as fair and as accurate in its determinations as the criminal process.

To put the matter in different terms, in dealing with criminal cases, this Court has adopted the selective incorporation theory to determine which of the Bill of Rights apply to the states through the Fourteenth Amendment. In so doing, the Court has rejected the total incorporation theory advocated by Mr. Justice Black and the fundamental fairness theory advocated by Mr. Justice Harlan.[1] The latest formulation of the selective incorporation theory was stated in *Duncan v. Louisiana*, 391 U. S. 145, 149 n. 14 (1968) (emphasis added):

> . . . state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developed contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is *fundamental—whether that is, a procedure is necessary to an Anglo-American regime of ordered liberty.*

This clearly is not the fundamental fairness test, for if it were Mr. Justice Harlan would have had no quarrel with it. Rather, even when fairness is possible without a particular procedure, the procedure is nevertheless required in state criminal trials if it is necessary to the American regime of ordered liberty. Thus, trial by jury is "not necessarily fundamental to fairness", *Duncan v. Louisiana*, 391

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[1] These three theories, which have divided the Court since **Palko v. Connecticut**, 302 U. S. 319 (1937), are expounded again in the various opinions of **Duncan v. Louisiana**, 391 U. S. 145 (1968).

U. S. at 149, n. 14, but because trial by jury was long ago established to protect against governmental oppression, it is necessary to the American scheme of ordered liberty. 391 U. S. at 155-56.

A. Juvenile Proceedings Are Governed by Due Process Fairness Rather Than Direct "Selective Incorporation."

This formulation of the selective incorporation theory clearly is not used by this Court in juvenile delinquency cases. First, if the two theories were identical, all constitutional procedures applicable in criminal trials would likewise be applicable in juvenile proceedings without further analysis. As appellee has already shown, this is not the case. Second, the Court has been explicit in formulating a test more akin to, if not identical with, Justice Harlan's fundamental fairness test. In *Gault,* 387 U. S. at 19-21, the Court said:

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy . . . [T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data.

In *Winship,* 397 U. S. at ——, 90 S. Ct. at 1070, the Court added:

> Gault decided that, although the Fourteenth amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative hearing, the Due Process Clause does require application during the ad-

> judicatory hearing of "the essentials of due process and fair treatment". . . . This case presents the single, narrow question whether proof beyond a reasonable doubt is among the *"essentials of due process and fair treatment"*.

(Emphasis added.) Again in *Winship*, the Court reiterated the words of the dissenting judges from the New York Court of Appeals. 397 U. S. at ——, 90 S. Ct. at 1072:

> A person accused of crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case. 24 N. Y. 2d, at 205, 247 N. E. 2d at 259.

Both appellate courts in Pennsylvania have interpreted this Court's opinions as only requiring fundamental fairness in juvenile proceedings. In *Commonwealth v. Johnson*, 211 Pa. Superior Ct. 62, 73-74, 234 A. 2d 9, 14-15 (1967), the Court in analyzing *Kent* and *Gault* said:

> The constitutional safeguards vouchsafed a juvenile in such proceedings are determined from the requirements of due process and fair treatment, and not by the direct application of the clauses of the Constitution which in terms apply to criminal cases.

The Pennsylvania Supreme Court, in denying appellant's appeal, noted that a fair system of juvenile justice could exist without jury trial. *Terry Appeal*, 438 Pa. 339, 350, 265 A. 2d 350, 355 (1970).

Defining the applicable test as one of fundamental fairness is not to solve the problem, however. The test must be more specific and concrete. Analysis of *Gault* and *Winship* indicates that this Court has required those procedures likely to induce accuracy in the fact-finding process and likely to reduce, to some extent, the evils and shortcomings of the juvenile justice system. In *Gault*, for example, a

fifteen-year-old boy was taken into custody after a neighbor complained about a lewd and indecent phone call. The deputy probation officer filed a petition the next day with the juvenile court alleging the boy's delinquency. The petition contained no factual allegations; in any event, it was not presented to Gault or his parents. That same day a hearing was held. The complainant did not attend; no one was sworn; no transcript or recording was made; Gault was not represented by counsel. Gault testified, but those in attendance could not later agree whether he admitted making obscene statements. The Court's reaction is not surprising: "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." 387 U. S. at 18. Likewise, not surprising is the Court's reference to "instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact." 387 U. S. at 19-20. Certainly Gault's hearing, so conducive to inaccurate fact-finding, was fundamentally unfair.

To insure fundamental fairness—that is, to insure accurate fact-finding procedures—Gault held that due process requires notice "sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded" and sufficiently particular in its factual allegations. 387 U. S. at 33. Second, due process requires "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he [the child] has a defense and to prepare and submit it." 387 U. S. at 36. Third, *Gault* held that due process requires an opportunity

for confrontation and cross-examination. 387 U. S. at 56. Such an opportunity is essential to accurate fact-finding.[2]

Winship, likewise, was concerned with accurate fact-finding. The standard of proof beyond a reasonable doubt, said the Court, was developed to "safeguard men from dubious and unjust convictions" resting on "factual error", 397 U. S. at ——, 90 S. Ct. at 1072.

The philosophical and jurisprudential principles involved here are set forth succinctly in *In re W*, 309 N. Y. S. 2d 280, 282 (Fam. Ct. Westchester Co., 1970):

> The recent Appellate Court and United States Supreme Court decisions involving rights of juveniles have been primarily concerned with the safeguarding of the rights of the juveniles and in affording to the juvenile such constitutional rights as would guarantee to him the benefit of counsel, protection against compulsory self-incrimination, confrontation of witnesses and notice of the issues involved (In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527). These decisions relate to the juvenile's rights with respect to the manner in which the Petitioner presents his affirmative case and the manner in which the youth defends against the allegations rather than whether the trial shall be before a judge only or a judge and jury. It is clear that the rights and interests of juveniles must be protected to avoid a finding that he committed an act which he in fact did not commit—in effect to protect

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[2] The exclusion of compulsory testimony by the accused is based only in part on a disbelief that such coerced testimony from an accused is likely to be accurate. More fundamentally, the Fifth Amendment prohibition against compulsory self-incrimination or coerced testimony by an accused is and has always been applicable to non-criminal proceedings, and a witness could not have been forced to incriminate himself merely on the grounds that he was testifying in a civil action or, in fact, was not testifying at all but merely under questioning or investigation. Thus, Gault did not announce a new policy, it merely reminded the courts that a juvenile accused had the same right to silence during a juvenile proceeding that existed through every other moment in his life.

the innocent juvenile against a finding of fault where none existed. Trial by jury is not related to the rights and protection which have been afforded juveniles under recent decisions.

B. Fundamental Fairness Does Not Require Use of the Jury As a Fact Finder.

If it is clear that the decision to require any given procedure in juvenile adjudications turns on whether or not that procedure is essential to the fair conduct and determination of the factual issues before the juvenile court, it is equally clear that trial by jury, while traditional in both criminal cases and civil cases at law, is not necessary to the fair finding of facts. Thus, for example, the majority of jurisdictions have no guarantee of trial by jury in equity matters, in workman's compensation cases or in wills and estates matters. The federal government provides no trial by jury in such vital quasi-criminal areas as deportation cases and courts-martial. Similarly, this Court itself recognized that "a criminal process which was fair and equitable but used no juries is easy to imagine," *Duncan*, 391 U. S. at 149, n. 14, and refused to apply *Duncan* retroactively in large part because there was no reason to believe that any particular trial without a jury was unfair, *DeStefano v. Woods*, 392 U. S. 631, 633-34 (1968).[3] Nor has

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[3] Appellant relies upon the study done by Kalven and Zeisel, The American Jury, pp. 189-90 (1966), which concludes, among other things:

> If a society wishes to be serious about convicting only when the state has been put to proof beyond a reasonable doubt, it would be well advised to have a jury system.

This is a formidable statement in light of **Winship**, which held that proof beyond a reasonable doubt is necessary in juvenile proceedings. For this reason, it is in order to raise some questions about the study which produced this conclusion. First, the authors, in studying the extent of disagreement in criminal verdicts reached by judges and juries, relied on a method that required the judge to locate the sources of disagreement. American Jury, at 94. The jurors were never asked

anything in this Court's subsequent decisions in *Baldwin v. New York*, —— U. S. ——, 90 S. Ct. 1886 (1970), and *Williams v. Florida*, —— U. S. ——, 90 S. Ct. 1893 (1970), reiterating the applicability of the jury trial guarantee to serious criminal cases modified any of the principles set forth in *Duncan*.

And if no system dispensing with trial by jury has been attempted in the United States with respect to criminal trials, it is equally clear that the vast majority of states have constructed such systems in the juvenile realm. As of 1969, twenty-seven American jurisdictions denied the right to trial by jury in juvenile cases whereas only twelve re-

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to explain their verdicts; rather, the judges were asked to explain why the jurors voted as they did. Second, the authors found that the judge and jury disagreed on the verdict only about 25% of the time, and in only 16% of the cases was the jury more lenient. American Jury, at 59. The authors, moreover, limited even the significance of this finding **(ibid.)**:

> But this figure must not be made the basis for a general probability calculus by **any** defendant, because the cases to which this 16 per cent applies have been selected for jury trial **because** they are expected to evoke pro-defendant sentiments.

Moreover, on the basis of the responses from the judges, the authors concluded that the jurors only disagreed one-third of the time because they saw the facts differently; "in the remaining two-thirds of the cases the sources of disagreement are to be seen fully only by looking beyond the official role of the jury." American Jury, at 116. This includes factors such as the jury was unsympathetic with the law, the jury had certain sentiments about the defendant, the jury did not have facts the judge had, and the jury was influenced by the disparity of counsel. In none of this is there any mention of jurors and judges disagreeing because of different feelings about the standard of proof. But Kalven and Zeisel were convinced such a reason should exist; therefore, they posited that some differences occurring on factual grounds must exist for this reason. How did they prove this?

> If it [the difference over this standard] is operative there should be some cases of disagreement which cannot be explained in any other terms.

American Jury, at 185.

Hence, it is seen that judges were asked to explain why jurors voted as they did, and only by a process of elimination did the authors find a difference as to the standard of proof. This is hardly a basis for making constitutional decisions concerning the place of trial by jury in factual determinations.

quired it.[4] And, since that time, Congress has removed the District of Columbia from the minority and added it to the majority with the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, P. L. 91-358, 84 Stat. 473 (July 29, 1970). This Act replaced Section 16-2307 of the D. C. Code, which provided for trial by jury in juvenile cases with a new Section 16-2316, which specifically requires trial by the court alone. Typically, the Pennsylvania Juvenile Court Law, Act of June 2, 1933, P. L. 1433, Sec. 5, 11 P. S. Sec. 247 provides: "except as hereinafter provided, the court shall hear and determine all cases affecting children arising under the provisions of this act without a jury." The judgment of twenty-eight legislative bodies, including the Congress of the United States, that fairness in juvenile proceedings does not require trial by jury deserves the respect of this Court.

Nor has a single appellate court anywhere in the United States held that the federal constitution requires the granting of jury trials at juvenile delinquency hearings under a statutory scheme in any way resembling that set forth by the Pennsylvania Juvenile Court Act.

For example, the question which appellant seeks to raise in this case was first faced and decided by the Superior Court of Pennsylvania in the light of *In re Gault*, 387 U. S. 1 (1967), in *Commonwealth v. Johnson*, 211 Pa. Superior Ct. 62, 234 A. 2d 9 (1967). In an opinion by the Honorable J. Sidney Hoffman, long a judge of the Philadelphia Juvenile Court, the Court held that the *Gault* opinion required only that the basic fairness of due process and not the specific attributes of an adult criminal trial (including trial by jury) be applied to juvenile proceedings.

Among Judge Hoffman's most significant observations were the following (211 Pa. Superior Ct. at 73-75, 211 A. 2d at 15-16):

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[4] The statutes are cited in Note, A Due Process Dilemma, Juries for Juveniles, 45 N. D. L. Rev. 251, 258, nn. 48-49 (1969).

The Court further hastens to point out that no inference should be drawn from its opinion that juveniles must be treated exactly as are adults in criminal proceedings. Quoting from its earlier opinion in *Kent v. United States*, 383 U. S. 541, 562 (1966), it stated: "'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure **up to the essentials of due process and fair treatment.**' We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution" (pp. 30-31).

Significantly, the Supreme Court in *Kent*, in making the above statement, was apparently relying on the following statement in *Pee v. U. S.*, supra, p. 599: "The constitutional safeguards vouchsafed a juvenile in such proceedings are determined from the requirements of due process and fair treatment, and not by the direct application of the clauses of the Constitution which in terms apply to criminal cases. So far as we can ascertain, with few exceptions in a multitude of cases, this has been the ruling of the Courts. By the same token the Federal Rules of Criminal Procedure do not apply to these proceedings."

Nor does the Supreme Court suggest that the adversary system is now required in juvenile court, but only that Due Process requirements ". . . in contested cases will introduce *some* elements of the adversary system". (Emphasis ours.) (p. 27). Finally the Court does not hold that a juvenile court may not act in a parental manner, but only that this authority must be curbed: "In Kent v. United States, supra, we stated that the Juvenile Court Judge's exercise of the power of the State as *parens patriae was not unlimited*. We said that 'The admonition to function in a "parental" relation-

ship is not an invitation to procedural arbitrariness' ". (Emphasis added.) (p. 30).

In short, those who find in *Gault* the obliteration of any distinctions between the treatment accorded juveniles and adults are reaching a conclusion that is unwarranted. It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. It is seeking to reverse the trend whereby "the child receives the worst of both worlds: . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." (*Kent v. U. S.*, supra, p. 556.) It has not suggested that we discard the flexibility which has long been the hallmark of juvenile courts, but that we temper it with certain procedural safeguards.

The Supreme Court's opinion should not be viewed by the Courts or Judges of this Commonwealth as a mandate to abandon the juvenile court adjucative procedure. Rather, it is an invitation to formulate a court procedure which will combine the best aspects of juvenile and criminal court procedure into an amalgam which will offer the juvenile the best of both worlds. The Supreme Court, in our view, recognized that there are essential differences between the trial of adults and juveniles. Similarly, juvenile court judges must recognize these differences and exercise their discretionary powers, if the aims or purposes of the juvenile court are to be achieved.

Judge Hoffman showed most poignantly that if jury trials are inserted into juvenile court proceedings, "the juvenile court judge will be sorely limited in carrying out the special tasks which the legislature has assigned to him." (211 Pa. Superior Ct. at 77, 211 A. 2d at 17.) He also made note of the fact that the National Crime Commission Report, to which the Supreme Court frequently referred in *Gault*, contains the following significant statement (*Ibid.*):

> Most States do not provide jury trial for juveniles. Even Illinois, New York and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. *As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.*

The court's opinion concluded that the institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in its unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children.

In reaching this conclusion, the Pennsylvania court blazed a trail that was quickly followed by the Supreme Court of Washington in *Estes v. Hopp*, 73 Wash. 2d 272, 438 P. 2d 205 (1968). In fact, of some fourteen jurisdictions in which appellate courts faced the question of the requirement of jury trial in juvenile cases, only the Supreme Court of New Mexico in *Peyton v. Nord*, 78 N. M. 717, 437 P. 2d 716 (1968), has held that jury trials were required, and the basis of the New Mexico decision was not the federal Constitution but provisions of the New Mexico Constitution and statutes totally inapplicable to this case.[5]

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[5] The only two federal cases which have even peripherally adverted to the right to jury trial in the light of **Gault** are of no help in solving the question. In **Nieves v. United States**, 280 F. Supp. 994 (S. D. N. Y. 1968), the court decided that such a right existed under the federal Juvenile Delinquency Act because that Act did not provide that juveniles were automatically free from criminal prosecution but, instead, normally gave the juvenile the choice between prosecution as an adult and adjudication as a juvenile. The result of the peculiar federal scheme, accordingly, was, the court held, to force the juvenile defendant to waive his right to jury trial in order to

Underlying the decision in *Johnson* and its numerous approving progeny discussed in the succeeding section of this brief is the recognition that trial by an expert juvenile court judge is central to the remedial philosophy of the juvenile court act in Pennsylvania as in the vast majority of American jurisdictions. Accordingly, to require trial by jury in delinquency proceedings would transform the whole legislative intention and undermine the entire juvenile court act. As the Supreme Court of Oregon said concerning its similar act in *State v. Turner,* 88 Ore. Adv. Sh. 363, 453 P. 2d 910, 912 (1969):

> It would be simple, by striking down the juvenile code, to return the accused child to the criminal courts and thereby afford him the full range of constitutional due process which accompanies a criminal trial. The juvenile then would be entitled to indictment, bail, and all the other rights of an adult. But the *Gault* case recognized that, despite its faults when loosely administered, the *parens patriae* concept has some residual validity, and expressly refrained from a "root and branch" extirpation of the separate juvenile system.

See also *Shane v. Maine,* —— Me. ——, 237 A. 2d 412 (1968).

Finally, supporting the holding of the court in *Johnson* is the fact that the delays which would be caused by the introduction of the right to trial by jury into juvenile hearings make it clear that jury trial is incompatible with the juvenile court system. A simple judicial observation of the adult criminal courts and civil courts must make it clear to this Court that the right to demand a jury trial is the

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obtain other benefits. This scheme is, of course, unconstitutional. Compare **United States v. Jackson,** 390 U. S. 570 (1968). On the other hand, the court in **Heard v. Rizzo,** 281 F. Supp. 720 (E. D. Pa.), aff'd, 392 U. S. 646 (1968), approved the Superior Court's decision in **Johnson** in general terms not specifically related to the jury trial question, but recognizing the effective work of the Pennsylvania appellate and trial courts to develop an effective compliance with **Gault.** The court in **Heard,** moreover, found in the **Gault** opinion an approval of the beneficial and humane schemes of juvenile processes as illustrated in the Pennsylvania Juvenile Court Act.

right to delay any trial whatever. Where an adult chooses to do so, the damage to the state may be great, but the damage to the defendant, at least, is normally limited to the delay of his trial. In juvenile cases, by contrast, the damage of delay to the State is identical, but the cost of the delay to the juvenile, is far more extreme, for the whole purpose of the juvenile court act is to mold the developing personality of a swiftly-changing youth so that he may grow up a member of society rather than its enemy. The very fluid nature of the youthful character makes any delay a potential disaster. Under these circumstances, it is enough for the state to provide a fair means of determining delinquency and choosing the promptness of such means available, so that the delinquent can be treated, where possible, before it is too late.

C. Despite Duncan, State Appellate Courts Have Almost Uniformly Upheld the Legislative Judgment That Bench Trials Are Preferable in Juvenile Proceedings.

Nor has the decision in *Duncan v. Louisiana,* supra, relied upon so heavily by appellants, persuaded the state courts that juvenile proceedings, in contrast to criminal trials, must include trial by jury. Finding *Duncan* inapplicable to juvenile proceedings, not one, but eleven, state appellate courts, including the court below, have decided unequivocally since *Duncan* that the Constitution does not give juveniles the right to a trial by jury. By contrast, not a single State has adopted the argument here urged upon this Court.

One of the most comprehensive opinions discussing the question is found in *In re Johnson,* 255 A. 2d 419 (Md. 1969), wherein the Court of Appeals of Maryland discussed the entire question of the applicability of jury trials to juvenile cases. Although counsel for appellant relied upon *Duncan,* see 255 A. 2d at 421, the Court refused to apply the *Duncan* rationale to juvenile cases, noting that the *Gault* decision did not hold that all the criminal procedures labelled "due process rights" need be applied to juveniles. Rather, the Court held, a juvenile is guaranteed only those

rights required in criminal trials whose existence was necessary to provide for a fair hearing in juvenile courts. Moreover, the Court equated juvenile hearings with trials in equity wherein a jury has never been the finder of fact. Based on this reasoning and a study of the earlier decisions, the Court concluded unanimously that jury trial was not required in juvenile cases.

Similarly, the Supreme Court of Ohio in *In re Agler*, 19 Ohio St. 2d 70, 249 N. E. 2d 808 (1969), refused to require jury trial in juvenile cases, again looking to equity jurisdiction as the touchstone by which the fairness of trials without juries should be judged. The Court held (249 N. E. 2d at 814):

> Furthermore, we can perceive no benefit worthy of destroying a juvenile's traditional entitlement to special status which might accrue to an alleged delinquent from a jury trial. Unquestionably, fair adjudication can be had for a child represented by counsel, from a judge applying proper rules of evidence and a proper standard of proof. There exists a right of appeal to remedy error and reviewing courts may exercise vigilance over arbitrary determinations of delinquency.

Moreover, the Court declined to require indictment in delinquency proceedings, appropriately declining "to label delinquency a capital or otherwise infamous crime" which would require indictment or jury trial. Just as the Court in *Gault* had criticized labeling delinquency proceedings "civil" and thereby avoiding all need to provide constitutional protections, the Court in *Agler* noted that no purpose was served by simply treating juvenile proceedings as "criminal." In fact, the whole purpose of the juvenile proceeding was to avoid many of the attributes of criminal trial.

Yet again, the Supreme Court of Oregon in *State v. Turner*, 88 Ore. Adv. Sh. 363, 453 P. 2d 910 (1969), refused to apply *Duncan* to juvenile cases (453 P. 2d at 913-14):

> Regardless of the veneration in which Anglo-American law rightly holds the jury as an instrument of

criminal justice, it must be remembered that crime and punishment are not the primary business of the juvenile court. There is reason to question whether a jury trial is the most trustworthy instrumentality for protecting the rights of the child, his parents, and the state in a proceeding intended to salvage a child, if he is in need of governmental control.

One of the principal reasons for retaining trial by jury in the administration of criminal justice has been the desire of American society to mitigate the letter of the criminal law. When the question is "guilt" or "innocence," the people feel more secure in their confrontations with the government when a jury is present. The jury brings to its work in a criminal case a combination of sentiment and common sense. Frequently, the jury views the state with healthy skepticism, and tempers justice with subjective values for which no provision had been made in any statute. As Mr. Justice Holmes observed in Horning v. District of Columbia, 254 U. S. 135, 138, 41 S. Ct. 53, 54, 65 L. Ed. 185 (1920), "* * * the jury has the power to bring in a verdict in the teeth of both law and facts." The ad hoc legislative contribution of the jury system to the criminal law might enhance an occasional case involving the wardship of a child. But it is not certain that broad generalizations equating adult and juvenile cases are justified. If the fact-finding process before the judge is conducted in a fair and trustworthy manner without a jury, it is arguable whether the clash and clamor of a jury trial would enhance the rehabilitation of a child. See e.g., discussion in Dryden v. Commonwealth, supra, and In re Estes, supra.

We recognize the distinction between the adjudicative phase of a juvenile case and the dispositional phase. We are also aware that it is possible to utilize the jury in the first phase and to exclude it from the second. There is reason to believe, however, that, at least in cases of first offenders and of other children

who have not yet embarked upon a criminal career, the adjudicative phase of their court experience presents an important rehabilitative opportunity. See Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum. L. Rev. 281, 283, 289, 321, 325 (1967) (internal evidence indicates, however, that this article was written before the Court published its decision in *Gault*).

The imponderable question, of course, is whether there is any substantial danger that a child brought before a court without a jury would be found "in need of wardship" when in fact he had not committed the act charged. The concomitant question is whether the presence of the jury in the case would contribute a sufficiently substantial reduction in the margin of error to outweigh the possible harm to the child from participation in the drama of a criminal trial.

During the evolution of separate courts for juveniles the nation's legislative bodies considered all the arguments for and against jury trials in such cases. The possible danger of "convicting the innocent" undoubtedly weighed heavily in legislative deliberations. Unfortunately, however, no objective data have been found to answer the question whether such a danger exists. A dozen of the states and the District of Columbia have elected to provide jury trials for children. See Note, A Due Process Dilemma—Juries for Juveniles, 45 N. Dak. L. Rev. 251, 258 (1969). The majority of the states have decided that jury trials in juvenile cases would do more harm than good. While virtually all these legislative decisions antedated *Gault*, the legislators must have believed that the danger of a miscarriage of justice in the absence of a jury was remote.

This same analysis is clearly equally applicable to the Pennsylvania Juvenile Court Act.

Similarly, the Supreme Court of Indiana in *Bible v. State*, —— Ind. ——, 254 N. E. 2d 319, 324 (1970), gave its reasons for choosing to uphold the trial of juvenile cases to the court alone:

> The child will feel that he is being dealt with fairly, firmly and compassionately by the state. The less complex the procedure and the less formal the relationship between judge and juvenile, the more likely the child will understand the proceedings before him and the disposition thereof. This factor more than any other is essential if he is to develop a respect for the law. Thrusting a child into a criminal trial-like procedure with all of the strangeness of motions, objections, presumptions and burdens, etc., most of which only his attorney would comprehend, would provide little therapeutic value to the child and likely would be psychologically harmful.

A like result was reached by the Supreme Court of Nebraska in *DeBacker v. Brainard*, 183 Neb. 461, 161 N. W. 2d 508 (1968), appeal dismissed, 396 U. S. 28 (1969), and this holding was reaffirmed in *In re Geiger*, 184 Neb. 581, 169 N. W. 2d 431 (1969). While the Supreme Court of Nebraska is the only appellate court a majority of whose members have voted to require jury trials in juvenile cases since the *Duncan* decision, even in Nebraska jury trials are not required since five justices must concur in a finding of unconstitutionality under Nebraska law. Thus, even in Nebraska, *Duncan*, upon which the dissenting justices based their opinion, has not been held to require jury trials for juveniles.

The highest courts in both North Carolina and Mississippi have also specifically considered the *Duncan* decision and held that the federal Constitution does not require a jury trial in juvenile cases despite *Duncan*. *In re Burrus*, 169 S. E. 2d 879 (N. C. 1969); *Hopkins v. Youth Court of Issaquena County*, 227 So. 2d 282 (Miss. 1969). And the Court of Appeals of Kentucky, the highest court in that state, similarly rejected the right to jury trial in juvenile cases in a post-*Duncan* decision. *Dryden v. Commonwealth*, 435 S. W. 2d 457 (Ky. 1968). Its reasoning was that (435 S. W. 2d 457, 460-61):

> A jury trial, with all the clash and clamor of the adversary system that necessarily goes with it, would certainly invest a juvenile proceeding with the appearance of a criminal trial, and create in the mind and memory of the child the same effect as if it were. In our opinion there is more to be lost than gained. Certainly we cannot regard a jury as a better, fairer, more accurate fact-finder than a competent and conscientious circuit judge. There may be some judges who do not fit this description, but neither do all juries.

This same conclusion has since been adopted by appellate courts in two more of the most populous states. See *In re Fucini*, 44 Ill. 2d 305, 255 N. E. 2d 380 (1970); *In re R. L.*, 3 Cal. App. 100, 83 Cal. Rptr, 81 (1970).

D. The Most Careful Commentators Have Concluded That Trial by Jury Would Detract, Rather Than Add to the Fairness of Juvenile Proceedings.

Moreover, assuming that commentators as well as judges and legislators should be consulted in determining what constitutes fundamental fairness in the adjudication of delinquency, it is noteworthy that the outstanding students of the juvenile court system have declined to urge jury trial in delinquency cases. Thus, in refusing to hold that the Constitution requires jury trials in delinquency proceedings, the Supreme Court of Oregon in *State v. Turner*, 88 Ore. Adv. Sh. 363, 453 P. 2d 910, 913 (1969), held:

> Adverting again to the fundamental fact that we are dealing with children and not with adults, the ultimate question in a juvenile proceeding is not one of "guilt" or "innocence," but rather one of determining what is in the best interest of the child.
>
> Many thoughtful students of behavior and rehabilitation believe there are valid policy reasons for holding that due process, when applied to children, does not necesarily include the right to have a jury pass upon

the question of fact which must lie at the threshold of juvenile wardship.

Among the authorities relied on by that Court were the President's Commission on Law Enforcement and Administration of Justice's Report on "The Challenge of Crime in a Free Society," cited with approval by the Court in *In re Gault*, 387 U. S. 1, 38 (1967). It is of particular importance to note that in the recommendations set forth by the National Crime Commission Report the right to a jury trial in juvenile court is conspicuously absent. On the other hand, the recommendations of the Commission and the holding of *Gault* are carefully complied with by the Pennsylvania Juvenile Court Act.

Moreover, in the Task Force Report: "Juvenile Delinquency and Youth Crime", p. 38, The President's Commission on Law Enforcement and Administration of Justice enlarged upon the report set forth in "The Challenge of Crime in a Free Society", and stated as to jury trials:

> Most States do not provide jury trial for juveniles. Even Illinois, New York, and Carifornia, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.
>
> As has been observed, "A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge." The presence of a jury tends in a number of ways to contribute to an atmosphere of formality. In part, formality becomes itself an end insofar as it helps instill in jurors a sense of the seriousness and solemnity of their

duties. Moreover, the presence of a jury affects the whole process of dealing with evidence. Much of the reason for many restrictive rules of evidence, which typically give rise to narrow contentiousness over marginal issues, stems from the felt need to protect against a jury's susceptibility to prejudice and irrelevancies and its limited ability to distinguish between the more and less probative. And when a jury is the object of an attorney's persuasion, he naturally responds to what he believes will most affect it, with the usual result an emphasis on staging, effect, and emotion rather than a more businesslike presentation.

A further consideration arguing against a jury arises out of the typically loose and general statutory formulations of the behavior that may subject a youth to juvenile court jurisdiction, particularly insofar as the conduct includes acts other than those that would be criminal if engaged in by adults: *i.e.*, incorrigibility, need for care and supervision, truancy. Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms. If a jury were required, the appropriate standard of proof (beyond a reasonable doubt, preponderance of the evidence, and so forth) would become a more critical issue.

As Mr. Justice Cardozo noted, it would not appear that a fair and enlightened system of justice is impossible without jury trials. "This too might be lost, and justice still be done."

Other autoritative persons who have deeply studied this question have arrived at the same conclusion. In the latest draft of the "Uniform Juvenile Court Act," drafted by the National Conference of Commissioners on Uniform State Laws and by it approved and recommended for enactment in all the states at its Annual Conference, July 22—August 1, 1968, which was approved by the American Bar Associa-

tion at its meeting at Philadelphia, Pennsylvania, August 7, 1968, provides in this regard, Section 24, page 20:

> (a) Hearings under this Act shall be conducted by the court without a jury, in an informal but orderly manner, and separate from other proceedings not included in section 3.

A distinguished group of judges throughout the nation intimately conversant with the problems of crime and delinquency has recently gone on record as favoring adjudicatory hearings without a jury in juvenile courts. In "Model Rules for Juvenile Courts" adopted by the Council of Judges of the National Council on Crime and Delinquency 1969, while not specifically so stating, it is clear from the rules that no jury is contemplated. Rule 23, page 49, and Rule 24, page 51, together with the comment on Rule 24, are as follows:

> Rule 23. Order of Proceedings.
>
> The court shall begin the hearing by determining whether all parties are present and whether lawful notice of the hearing has been given, and it shall require that these facts be of record. It shall then inform the parties of the substance of the petition.
>
> Before taking testimony, the court shall explain to the child and his parents their rights as set forth in Rules 38 and 39 and shall assign counsel if required by Rule 39.
>
> When the court has explained to the child the meaning of the right to remain silent and finds that he adequately understands this right, it may inquire of the child in a case brought under [section of the juvenile court law dealing with jurisdiction because of the child's violation of law or of a required standard of behavior] whether he admits or denies all or some of the allegations in the petition. Failure or refusal of the child to admit the allegations shall be deemed a denial of them.

If any or all of the allegations of the petition admitted by the child are sufficient to give the court jurisdiction, the court may take testimony to corroborate the admission or may proceed directly to the adjudication.

Rule 24. Preparation and Presentation of Evidence.

If the allegations of the petition are in issue, whether the testimony shall be elicited by the court or by a civil legal officer of the state or a subdivision thereof shall be determined by the court: The court shall base its determination on the complexities inherent in the case.

Comment.

In most cases, testimony should be elicited by the judge, who can insure the legality of the proceeding while maintaining the informal atmosphere that has traditionally permeated the juvenile court. On occasions, which the court anticipates complex questions of introduction of evidence, it may find it advantageous for the state's case to be elicited by an attorney, who can present the proof in appropriate order and control the testimony that will be given.

The prosecutorial atmosphere of criminal trials should have no place in juvenile courts. The purpose of the hearing is the elicitation of facts, avoiding the urge to obtain convictions prevalent in criminal courts. Prosecutorial techniques should therefore be avoided; if it is necessary for the facts to be elicited by an attorney, he should not be a member of the prosecutor's office.

The eliciting of testimony by a probation officer, untutored in the law, is not conducive to an orderly hearing and tends to undermine the child's faith in the impartiality of the probation staff, which may be called upon after disposition to work with the child. If the probation officer is in possession of facts related to the acts alleged in the petition, his role at the adjudicatory stage is only that of a witness.

Some members of the Council of Judges and the National Council of Juvenile Court Judges maintain that in any contested juvenile case, the testimony cannot be successfully elicited by the court and that it should be elicited by a civil legal officer. They hold that the same objections to presentation of the case by the probation officer apply to its presentation by the court and that, in addition, a judge cannot listen to the testimony and observe the reactions of the parties while he frames questions to be posed to a witness.

Similarly, the Honorable Lindsay G. Arthur, Vice President of the National Juvenile Court Judges Association, in an article entitled "Should Children Be As Equal As People?" 44 N. D. L. Rev. 204, 215 (1969), discussed the unwisdom of permitting jury trials in juvenile court matters.

> A jury trial would inevitably bring a good deal more formality to the juvenile court without giving a youngster a demonstrably better fact-finding process than trial before a judge.
>
> A jury of peers is a protection to both the public and the individual from authority and judicial whim. Peers have a degree of sympathy, they can relate to the accused and understand in some measure his idiom and his world. But children are children's peers, and children can't be tried by a jury of children. Yet adults can't understand long hair, and teeny-bop talk, and the driving fear of being left out, and the perplexing problem of identity for a changing body with a changing mind in a changing world. Adults can be taken in by giving a hoodlum a suit, a tie, and a crew cut, and adults can be put out by the normal rebellion of children striving for independence. Possibly judges who are in constant touch with juveniles come closest to being their peers—if empathy is peerage. And in a court of equity, from which the juvenile courts have evolved it was thought that: *where remedies were*

needed beyond law's rigidities, justice can better come from judges than from juries.

What appellants here seek is not a trial by jury in the sense that this device has been known traditionally in the law. Rather, appellants are seeking to replace the juvenile court judge, who has a special expertise in determining both the existence of delinquency and the propriety of making a finding of delinquency with a jury made up of the peers of the parents of the juveniles. At a time when even the expert juvenile judge has a difficulty bridging the generation gap, it seems clear that the introduction of the jury into juvenile cases cannot improve, and, in fact, must damage the juvenile court as a fact-finder or a rehabilitative device.

Were juvenile cases purely criminal matters, the traditional application of constitutional guarantees *in haec verba* might require provision for trial by jury; since the whole basis of the juvenile court acts is, however, to remove the criminalization of the proceedings, the states should be left free to experiment with improved and varied methods of adjudication so long as the procedure does not violate due process concepts of fundamental fairness.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the order of the court below be affirmed.

Respectfully submitted,

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